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# **Exploring the Scope of Student and Faculty Academic Freedom**

Audio Conference

**Wednesday, September 21, 2005**

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Presented by:

**Gary Pavela**

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## Gary Pavela

Gary Pavela is director of Judicial Programs at the University of Maryland- College Park, and edits the national quarterly *Synthesis: Law and Policy in Higher Education* as well as its sister publication, *Synfax Weekly Report*—publications to which over 1,000 colleges and universities in the United States and Canada subscribe. He has written widely on legal issues related to students with mental disorders, and is a nationally recognized authority on the design and implementation of student conduct policies. Gary serves on the Advisory Board of the Kenan Ethics Institute at Duke University, and was designated the 2002 "Fellow" of the National Association of College and University Attorneys. Fellows of the Association are identified as individuals who have "brought distinction to higher education and to the practice of law on behalf of colleges and universities across the nation. Gary is also the 2005 winner of the NASPA "Contribution to literature/research award."

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Co-author, *The Law of Higher Education*

**Critical issue focus:**

**Defining the Scope of Faculty and Student Academic Freedom**

Gary Pavela

**What is academic freedom?**

- [1] "The essentiality of freedom in the community of American Universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. *Teachers and students* must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die . . . Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society" [emphasis added].

*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) [Due process clause of the Fourteenth Amendment was violated when appellant was jailed for refusing to answer questions about contents of a lecture delivered at a state university, and his knowledge about the Progressive Party and its members]

- [2] "It is the business of the University to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail '*the four essential freedoms*' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" [emphasis added].

Justice Frankfurter concurring in *Sweezy v. New Hampshire* 354 U.S. 234, 263 (1957), citing a statement from a conference of senior scholars from the University of Cape Town.

- [3] "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, [364 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than

through any kind of authoritative selection.' *United States v. Associated Press*, 52 F. Supp. 362, 372."

*Keyishian v. Board of Regents* 385 U.S. 589, 603 (1967) [New York teacher loyalty oath requirements were unconstitutionally broad and vague].

- [4] "[M]y circuit held squarely in 1980 that it would pay no special deference to the hiring or promotion decisions of academic officials; our courts review these decisions under the same Title VII standards as apply to any other employer." [citing *Jepsen v. Florida Board of Regents*, 610 F.2d 1379 (5th Cir., 1980)] [1619]

Thomas Gibbs Gee, Judge for the United States Court of Appeals for the Fifth Circuit "Enemies or Allies?": In Defense of Judges" 66 *Texas Law Review* 1617, 1619 (1988)

### **Who is entitled to academic freedom?**

- [5] "The very core of the doctrine remains confused: To whom does it belong? Can academic freedom be claimed by institutions in dealing with the outside world, faculty dealing with administrators, or faculty in dealing with peers?"

The status of academic freedom under the Constitution is equally unclear. Is it simply a shorthand description of rights that would otherwise be recognized under the Constitution, or is academic freedom uniquely a right of professors? Although most scholars agree that the Constitution protects academic freedom, the Supreme Court . . . has not made clear whether academic freedom is a distinctive liberty of professors, with its own constitutional contours, or simply a form of first amendment rights enjoyed by all citizens." [p.1249]

Julius G. Getman and Jacqueline W. Mintz "Forward: Academic Freedom in a Changing Society" 66 *Texas Law Review* 1247, 1249 (June 1988). [Associate Dean of the University of Texas School of Law; former Assistant Maryland Attorney General]

- [6] "Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do..."

The University has not suggested that Dr. Bishop cannot hold his particular views; express them on his own time, far and wide to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit him. The University has simply said that he may not discuss his religious beliefs or opinions under the guise of University courses."

*Bishop v. Aronov* 926 F.2d 1066, 1075-1076 (11th Cir. 1991)

- [7] "Vital First Amendment speech principles are at stake here. . . [The] danger is especially real in the University setting, where the State acts against a . . . tradition of thought . . . that is at the center of our intellectual and philosophic tradition. . . In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses."

*Rosenberger v. Rector and Visitors of the University of Virginia*.  
See *SWR* "College religious journal entitled to indirect subsidy",  
95.43, week of July 3, 1995, p. 380

- [8] "As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors . . . They protect their academic freedom."

The AAUP "Statement on Professional Ethics" available at:  
<http://www.aaup.org/statements/Redbook/Rbethics.htm>

- [9] "Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs. "

*Urofsky v. Gilmore* (4<sup>th</sup> Circuit, No. 98-1481, June 23, 2000).

## Defining the scope of student academic freedom

- [10] See "Memorandum to the Faculty" included with this outline. See also Pavela, "Academic Freedom for Students Has Ancient Roots" *Chronicle of Higher Education*, May 23, 2005, available at:

[http://www.newsdesk.umd.edu/um\\_in\\_news/clips/may23p.cfm](http://www.newsdesk.umd.edu/um_in_news/clips/may23p.cfm)

## Academic freedom in the classroom/ awarding grades

- [11] "Teacher evaluation is part of the University's own right to academic freedom...Although there may be other available and even more appropriate forms of teacher evaluation, the University has adopted the policy at issue here as a method of evaluation. Because the University's policy does not interfere with Dr. Wirsing's right to academic freedom, the University may require Dr. Wirsing to use its evaluation forms and it may withhold merit pay increases for her refusal to do so."

*Wirsing v. Board of Regents of the University of Colorado* 739 F. Supp. 551 (D. Colo. 1990).

- [12] "While much to our regret there may have been a time in our history when it was thought appropriate for us to refer to each other as 'kikes' or 'wops' or 'shanty Irish' or 'niggers,' thankfully we have overcome that disgrace. And those who insist on making such words part of their vocabulary must be labeled by the public as immoral"

*Clarke v. Board of Education of the School District of Omaha* 338 N.W.2d 272, 277 (Neb. 1983): [Directing racial epithets toward students constitutes "immorality" and justifies termination of tenured junior high school teacher].

- [13] "We conclude that by forcing [Professor] Parate to change, against his professional judgment, Student "Y's" grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm..."

Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed student "Y's" ...course grade, then Parate's First Amendment rights would not be in issue."

*Parate v. Isibor* 868 F.2d 821, 829-830 (6th Cir. 1989).

- [14] "As this case reveals, the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor...This Court has recognized the supremacy of the academic institution in matters of curriculum content..."

It is difficult to see what matters of public concern are implicated by [Professor] Keen's letters to [his student, Ms. Kathleen] Johnson (the purpose of which was to extract an apology from Johnson) and by the "F" grade he eventually gave her for not appropriately apologizing [for her classroom conduct]...Even if we were to assume that the First Amendment applies [to assignment of a letter grade], it would not be dispositive, because we would then balance Keen's First Amendment right against the University's interest in ensuring that its students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments...

Ample evidence supports the conclusion that Johnson did not receive a fair grade (the grade was based, ex post facto, on her 'failure' to apologize properly in letters written over the summer) and received demeaning and insulting letters [from Keen]...Keen's argument, taken to its logical extreme, would prevent a university from punishing a professor who failed a student for refusing sexual advances. The First Amendment does not shield Keen's conduct from sanctions."

*Keen v. Penson* 970 F.2d 252 (7th Cir. 1992)

- [15] "Edwards's reliance on the principle of academic freedom [to teach what the university regarded as "'doctrinaire material[s]' of a religious nature" is his "Introduction to Educational Media" class] does not affect our conclusion that the University can make content-based decisions when shaping its curriculum. The Supreme Court has explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 . . . The "four essential freedoms" that constitute academic freedom have been described as a university's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (quotations omitted) . . .

In sum, case law from the Supreme Court and this court on academic freedom and the First Amendment compel the conclusion that Edwards does not have a constitutional right to choose curriculum materials in contravention of the University's dictates."

*Edwards v. California University of Pennsylvania* (3rd Cir., No. 97-3285, August 10, 1998, *SWR* 98.35 "Who determines what should be taught? p.761).

### **Academic freedom and public statements outside the classroom**

- [16] "What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom

or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

*Pickering v. Board of Education* 391 US 563 (1968)

- [17] "This litigation had its inception in three writings of Levin, a tenured professor at the college, which is a public institution...Because these writings contained a number of denigrating comments concerning the intelligence and social characteristics of blacks, they elicited a mixed response, much of it critical in nature...[One response of the college was to create] an 'alternative' section of Philosophy 101 for those of Levin's students who might want to transfer out of his class...Similar action never before had been taken in the history of City College...Moreover, none of Professor Levin's students ever had complained of unfair treatment on the basis of race...

In addressing the issue of the 'shadow classes,' we emphasize the great reluctance with which this court intrudes upon the decisions of a university administration...Where, however, basic constitutional values have been infringed, this court will not remain silent. '[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment' [citation omitted]...

Formation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin's First Amendment rights...However, although appellants contended below that they created the alternative sections because Professor Levin's expression of his theories outside the classroom harmed the students and the educational process within the classroom, the district court saw no evidence that this was a factually valid concern...Given the complete lack of evidence to support appellant's claim of a legitimate educational interest, we are unable to say that the district court erred."

*Levin v. Harleston* 966 F. 2d 85, 87-88 (2nd Cir. 1992)

- [18] In 1994 the U. S. Court of Appeals for Second Circuit affirmed a lower court decision reinstating Professor Leonard Jeffries as Chairman of the Black Studies Department at the City College of New York. Professor Jeffries had been demoted after he made inflammatory remarks about Jews in an off-campus speech (see *Synfax Bulletin*, 93.125, p. 124 for excerpts from the lower court opinion, and *Synfax Weekly Report* 94.43, p. 231 for excerpts from the Second Circuit opinion). The Second Circuit's holding was then vacated and remanded by the Supreme Court (See *Synfax Weekly Report* 94.85, p. 300). In April 1995 the Second Circuit ruled that City College's action did not violate Professor Jeffries' First Amendment rights:

One of the principles driving our earlier *Jeffries* decision was that the First Amendment protects a government employee who speaks out on issues of public interest . . . unless the speech actually disrupted the employer's operations . . .

Applying that standard, we studied [Jeffries'] Albany speech, and found that it squarely involved issues of public concern--namely, the New York state public school curriculum, and black oppression . . . Then, after examining CUNY's bylaws, and the testimony of CUNY officials, we agreed with the district court that the position of Black Studies Chairman was a ministerial position at CUNY, and carried no policymaking authority. . . Thus, we held that the defendants bore the burden at trial to show that the speech actually interfered with CUNY operations. . .

[This] strict actual interference requirement reflected the law of the Second Circuit. See *Piesco v. City of New York*, 933 F.2d 1149, 1160 . . . The recent . . . decision [by the U.S. Supreme Court in *Waters v. Churchill* 128 L.Ed. 2d 686], however, has loosened *Piesco's* shackles upon public employers . . .

Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech . . . By stressing that actual disruption is not required, *Waters* pulls a crucial support column out from under our earlier *Jeffries* opinion. We are now constrained to hold under *Waters* that the defendants did not violate Jeffries' free speech rights if: (1) it was reasonable for them to believe that the Albany speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY, or, at least, for reasons wholly unrelated to the Albany speech . . .

Finally, we note that an amicus curiae argues that we should not apply *Waters* at all because Jeffries, as a faculty member in a public university, deserves greater protection from state interference with his speech than did the nurse in *Waters* . . . We recognize that academic freedom is an important First Amendment concern. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Jeffries' academic freedom, however, has not been infringed here. As we held in the earlier *Jeffries*. . . the position of department chair at CUNY is ministerial, and provides no greater public contact than an ordinary professorship. . . Jeffries is still a tenured professor . . . and the defendants have not sought to . . . limit his access to the "marketplace of ideas" in the classroom.

- [19] "We recognize that the government, as an employer, has broader powers in suppressing free speech than the government as a sovereign. Indeed, we have given some deference to an employer's predictions of workplace disruption . . . However, we have never granted any deference to a government supervisor's bald assertions of harm based on conclusory hearsay and rank speculation . . . There is simply no evidence that establishes a nexus between the two photographs [of history professors posing with weapons as "props"--displayed in a history department display case at the University of Minnesota at Duluth] and an exacerbated climate of fear on the campus or, more importantly, that establishes a relationship between the photographs and a decrease in the efficiency and effectiveness of UMD's educational mission."

*Burnham v. Ianni* 119 F.3d 668 (8th Cir. 1997)

### **Academic freedom and professional/ethical standards**

- [20] "Since there are no rights without corresponding duties, the considerations heretofore set down with respect to the freedom of the academic teacher entail certain correlative obligations. The claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim. The liberty of the scholar within the University to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language. The university teacher, in giving instruction upon controversial matters, while he is under no obligation to hide his own opinion under a mountain of equivocal verbiage, should, if he is fit for his position, be a person of fair and judicial mind; he should, in dealing with such subjects, set forth justly, without suppression or innuendo, the divergent opinions of other investigators; he should cause his students to become familiar with the best public expressions of the great historic types of doctrine upon the questions at issue; and he should above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves . . . "

From the AAUP 1915 "General Declaration of Principles" Hofstadter and Smith, *American Higher Education: A Documentary History* (Chicago, 1961) V.II p. 871

- [21] "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject . . . "

The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning an educational officer, he should

remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

From the AAUP 1940 "Statement of Principles on Academic Freedom and Tenure," Janet Sinder "Academic Freedom: A Bibliography" 53 *Law and Contemporary Problems* Summer 1990, 407-408.

[22] The AAUP "Statement on Professional Ethics" states, in part:

As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors . . . *They protect their academic freedom* (emphasis supplied).

Full text at: <http://www.aaup.org/statements/Redbook/Rbethics.htm>

### **Academic freedom and sexual harassment**

[23] See *Meritor Savings Bank v. Vinson*, 447 U.S. 57, 67 (1986): the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not, by itself, actionable under Title VII. To state a Title VII claim, the sexual harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

[24] In *Harris v. Forklift Systems*, 126 L. Ed. 2d 295 (1993)(see *Synfax Weekly Report* 93.154, Week of November 8, 1993, p. 151) the U.S. Supreme Court held that a plaintiff does not have to show that she suffered a "nervous breakdown" in order to recover for hostile environment sexual harassment. Instead, in Title VII cases, it must be shown that the workplace is permeated with "discriminatory intimidation, ridicule and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . ." [citing *Meritor Savings Bank v. Vinson*, 92. L. Ed. 2d 49, 1986].

The Court observed in *Harris* that:

This standard, which we affirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in an employee" does not sufficiently affect the conditions of employment to implicate Title VII . . . "

The hostile environment standard set forth in *Harris* was somewhat less favorable to sexual harassment plaintiffs than the newspaper headlines indicated. Likewise, lower federal courts have rejected hostile environment claims based, in part, on alleged "glares" in public places (*Bougher v. University of Pittsburg* 882 F. 2d 74, 3d Cir. 1989), or asking for dates, and commenting on appearance (*Murray v. New York University College of Dentistry* 57 F. 3d 243, 2d Cir. 1995). This does not mean that rude and offensive behavior should be tolerated. It simply indicates that federal courts and governmental agencies remain understandably reluctant to set and enforce nationwide standards for courtesy and good manners.

- [25] In *Cohen v. San Bernardino Valley College* (No. 95-55936, August 19, 1996), the U.S. Court of Appeals for the Ninth Circuit held that a tenured professor who used a sexually provocative teaching style at a public community college was subject to an unlawful "legalistic ambush" when the college sought to discipline him for sexual harassment. The *Cohen* case is consistent with a federal district court holding in *Silva v. University of New Hampshire*, reported in *SWR Week* of September 26, 1994, p. 275):

In the Spring of 1992, Cohen taught a remedial English class . . . One student in the class, who we shall refer to as "Ms. M.," became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner. During this class Cohen began a class discussion on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. Cohen has for many years typically assigned provocative essays such as Jonathan Swift's "A Modest Proposal" and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a "devil's advocate" style. During classroom discussion on pornography . . . Cohen stated in class that he wrote for *Hustler* and *Playboy* magazines and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, Ms. M asked for an alternative assignment but Cohen refused to give her one.

In this case, the College punished Cohen based on his teaching methods under the provision of the [Sexual Harassment] Policy which prohibits conduct which has the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." Cohen, admittedly, uses a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. He assigns provocative essays . . . and discusses controversial subjects . . . At times, Cohen uses vulgarities and profanity in the classroom and places substantial emphasis on topics of a sexual nature . . .

We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy. Rather, we hold that the Policy is simply too vague as applied to Cohen in this case. Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the Policy would be applied in such a way as to punish his long-standing teaching style -- a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College.

- [26] For a contrary view, see *Rubin v. Ikenberry* (C.D. Illinois, No. 921160, SWR 96.34 Week of September 2, 1996). A tenured professor at the University of Illinois was lawfully disciplined for repeated sexual comments, inquiries, and jokes addressed to students in and out of class:

The University is a public employer. While academic freedom is protected, it is not an independent First Amendment right. . . The court is unable to understand how a reasonable jury could conclude that many of Rubin's classroom comments could be appropriate for teaching students how to teach elementary school social studies classes. . . [e.g. asking students if they "would cook breakfast in the nude on request of their husbands"]. Rubin's classroom comments which have a sexual focus do not appear connected to the course content. . . Their relevance is quite attenuated.

- [27] In *Hayut v. State Univ. of New York* (CA2, December 18, 2003), the court held that the plaintiff (Inbal Hayut) presented sufficient evidence to support a sexual harassment claim against a professor (Alex Young) who persisted in referring to her as "Monica Lewinsky" and made demeaning sexual comments about her in the classroom.

We . . . find sufficient evidence to permit a trier of fact to find that the "Monica" comments were severe enough to transcend the bounds of propriety and decency, let alone harmless humor, and become actionable harassment based on Hayut's sex. The "Monica" nickname -- pulled from the headlines covering the contemporaneous Clinton/Lewinsky scandal -- can readily be understood as having powerful sexual connotations and overtones. This is especially so in light of Professor Young's "cigar" and "weekend" comments. Each remark, while brief, was made against a backdrop of classroom discussions and press coverage of the most salacious developments in the scandal. A reasonable jury could find that the "Monica" statements were more than mere joking comments or occasional vulgar banter, but were sexually-charged and designed by

Young to convey certain images about Hayut – that she “enjoyed the same sexual implements as the real Monica Lewinsky and that Ms. Hayut was a willing participant in deviant sexual activity with Young himself . . . .” [Plaintiff’s ] Brief at 7 . . .

The district court characterizes Young’s conduct as “highly offensive and obviously inappropriate . . .” We believe that this characterization of Young’s conduct, and specifically of his comments of a sexual nature, given their frequency, compels the conclusion that a reasonable jury could find that his actions “transcend[ed] coarse, hostile and boorish behavior” and became actionable as a constitutional tort . . .

- [28] In *Gebser et. al. v. Largo Vista Independent School District* (No. 96-1866, June 22, 1998), the Supreme Court held that a school would not be liable for sexual harassment of a student by a teacher, unless school officials had "actual notice of, and [were] deliberately indifferent to, the teacher's misconduct."
- [29] In *Burlington Industries v. Ellerth* (No. 97-569, June 26, 1998) and *Faragher v. City of Boca Raton* (97-282, June 26, 1998), the Supreme Court held that employers will be liable for the tangible, discriminatory employment actions of supervisors. However, in cases where a discriminatory “hostile environment” is created by a supervisor--but no tangible employment action is taken against a plaintiff employee--employers may escape liability by proving that they used “reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”
- [30] Justice O'Connor demonstrated her pivotal role on the U.S. Supreme Court when she provided the crucial fifth vote in *Davis v. Monroe County Board of Education* (No. 97--843, May 24, 1999), holding that Title IX authorizes a private cause of action for student-on-student sexual harassment. Most of Justice O'Connor's opinion was devoted to *limiting* the scope of the Court's decision--in order to minimize the risk of liability for schools and colleges. The Court held that recipients of federal funding may be liable for "subject[ing] their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.”

## Memorandum to the faculty: Defining the limits of student academic freedom

By Gary Pavela

The title of this memorandum will puzzle colleagues who are unaware that college students have any claim on academic freedom. But the idea of student academic freedom is imbedded in a key Supreme Court decision linking academic freedom to the First Amendment: *Sweezy v. New Hampshire* 354 U.S. 234 (1957) (reversing the contempt conviction of a professor who refused to answer questions from the state attorney general concerning the content of his lectures). In announcing the judgment of the Court, Chief Justice Warren observed that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (emphasis added).

Likewise, the AAUP has long recognized that students have academic freedom—a right professors have a professional obligation to protect. The AAUP "Statement on Professional Ethics" states, in part:

As teachers, professors encourage the free pursuit of learning in their students. They hold before them the best scholarly and ethical standards of their discipline. Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors . . . They protect their academic freedom (emphasis supplied).

One historical basis for recognizing student academic freedom was identified by the Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995) (university could not exclude a student publication from access to indirect, student-fee generated subsidies based solely on the publication's religious perspective). The Court pointed out that many of the great European universities were created by students, and managed by student guilds:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

According to the Court's analysis in *Rosenberger*, college students are not to be seen as passive "consumers" of educational services. Nor are they children in need of supervision or indoctrination. They are active participants in learning and the pursuit of knowledge, with corresponding rights to academic freedom protected by the First Amendment.

The courts have never defined student academic freedom to mean co-equal rights with faculty members in the design or teaching of classes. Teachers are presumed to have superior knowledge within their disciplines and are given overall responsibility for managing their classes and evaluating student performance. It isn't legally tenable, however, to make a blanket assertion that academic freedom for faculty members will always trump student academic

freedom in the classroom. A key case on that topic (drawn from the school setting, but fully applicable to higher education) is *Tinker v. Des Moines* 393 U.S. 503, 1969 (High school students were unlawfully suspended for wearing black armbands to protest government policy in Vietnam). Justice Fortas, writing for the Court, stated that:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years . . .

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained [citation omitted].

The holding in *Tinker* encompassed student expression (wearing black armbands) in the classroom. But what exactly does the Court's language mean? Would a student in a math class have a protected First Amendment right to assert that  $2+2=5$ ? Clearly that's not what the Justices had in mind. Downgrading students who give wrong answers to relevant academic questions does not reflect "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Faculty members who insist on accurate answers to legitimate questions are exercising their professional judgment, consistent with the institution's stated academic mission, and protected by faculty academic freedom.

But consider a more likely example. What if a student in a biology class answered all her examination questions correctly, but added an addendum urging the teacher to include Creationist perspectives in upcoming lectures? Might a teacher at a public university lawfully seek to punish the student's expression of such a viewpoint by giving the student a failing grade? The answer is probably not (few things in the law are absolutely certain), at least if the teacher didn't fail other students who had written other kinds of marginalia on examinations. This conclusion can be supported on First Amendment (academic freedom) grounds, as well as the established contractual principle that grading may not be "arbitrary and capricious."

Moving into the realm of expression blended with conduct, what if a student relied upon the holding in *Tinker* to engage in defiant behavior as a way to "protest" a teacher's classroom policies? On this question little guesswork is required, since we have a relevant precedent from the U.S. Court of Appeals for the Sixth Circuit in *Salehpour v. University of Tennessee* (1998). *Salehpour* involved an irrationally defiant forty-three-year-old dental student who insisted on violating two classroom professors' rules barring first-year dental students from sitting in the last row of their classrooms. The student's rationale for his behavior was that he was "advancing and pursuing" a "power struggle" with the university.

The court sided with the university in this "struggle," and wrote that:

As noted by [the university], it has been found that, "conduct by the student, in class or out of it . . . which for any reason . . . materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker v. Des Moines* . . . As such, we find that, here, Plaintiff's claim fails at the inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing and pursuing his admitted "power struggle" with the University, was not protected activity . . .

We cannot convey strongly enough that the purpose of this holding is not to discourage legitimate debate that is demonstrable or constitutes the vigorous expression of ideas in an academic setting, even when that expression may impose inconveniences. Indeed, the First Amendment right to freedom of expression of political, social, religious, and other such views may be most precious in an educational setting. However, as in the instant case, where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment. . . The rights afforded to students to freely express their ideas and views without fear of administrative reprisal, must be balanced against the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching. Under the facts of this case, the balance clearly weighs in favor of the University.

What can we conclude from the *Salehpour* case and this brief overview of student academic freedom? First, we should acknowledge that students have academic freedom. Second, it should be understood that student and faculty claims to academic freedom sometimes come into conflict. Courts will seek to balance those claims, giving due deference to faculty expertise. Third, courts will not be sympathetic to student expression that "materially disrupts class work or involves substantial disorder or invasion of the rights of others." Implicit in the concept of student academic freedom (as in academic freedom for faculty members) is the obligation to exercise that freedom in a way and for a purpose that transcends simple self-indulgence.

### **[31] CASE STUDY: Professor Mayer's Mission, Part II**

*(Note: a variation of this case study has been published by the AAUP in the November/December 2001 issue of Academe. The case study is available online at: <http://www.aaup.org/publications/Academe/2001/01nd/01ndpav.htm>)*

Pauline Mayer, a tenured professor in the Women's Studies Department at Placid State University, was known for forceful advocacy of a clearly stated mission: To teach her students about the extent of sexist oppression in America, and to promote their active involvement in challenging what she regarded as patriarchal forces of reaction, resistance, and backlash.

Professor Mayer attracted dedicated admirers—and persistent critics. Complaints against her eventually came in the form of a letter to the Dean of the Faculty, signed by three of the eighteen students in her “Theories of Feminism” seminar, accompanied by a supporting statement from Rusty Becket, a professor in the Department of History. The student complainants, and professor Becket, demanded that professor Mayer be subject to disciplinary action because she:

- [] Assigned class readings that ridiculed the Catholic Church for its position on abortion;
- [] Refused to award a student a letter grade until she apologized in writing for her “relentless, self-hating and self-destructive support for phallocracy”,
- [] Gave an off-campus speech suggesting that the frequency of rape on college campuses required a curfew for all males, including male faculty members;
- [] Stated, during the course of one seminar, that professor Becket’s latest book (questioning feminist theory) was “overtly sexist” and had been “plagiarized from the most misogynist essays written by the least intelligent sophomores” in Becket’s introductory classes;
- [] Repeatedly referred to the classroom comments of one of her student critics as “more bullshit from the resistance”;
- [] Refused to allow students (mainly her critics) who had earned a grade of *C or below on accumulated weekly quizzes to complete class evaluations—on the theory that those with low grades could not give intelligent or objective opinions.*

Upon receipt of the letter, the dean solicited a written response from professor Mayer. The dean received a prompt reply from professor Mayer’s lawyer, stating that all of the allegations pertained to matters involving academic freedom, protected by the First Amendment, and professor Mayer’s status as a tenured professor.

## **COMMENTARY**

### **How should the dean respond?**

- [a] The dean needs to confer with legal counsel. There are complicated legal issues involved that must be addressed in accordance with procedures and policy statements set forth in the faculty handbook or the contract of employment.

### **Selection of curriculum materials**

- [b] Some of the allegations against Professor Mayer raise legitimate academic freedom issues, and some do not. The first allegation, pertaining to assigned readings that ridiculed the Catholic Church for its position on abortion, should not result in any

disciplinary inquiry or action, unless there is reason to believe professor Mayer violated her contract of employment by teaching topics or assigning materials not relevant to the course. A pertinent case is *DiBona v. Matthews* 269 Cal. Rptr. 882 (Cal. App 4 Dist. 1990). There, a California appellate court held that administrators at San Diego Community College were not justified in canceling a drama class where a controversial play was to have been performed. The court observed that “the First Amendment does not transfer control of a public school curriculum from school administrators to individual teachers and students.” Nonetheless:

The facts of this case present a classic illustration of “undifferentiated fear” of disturbance on the part of school administrators. *DiBona* [the course instructor] was given the authority to select curriculum materials. The administration became interested in the subject matter of the class only after “community” opposition [to the proposed play] was first manifest. When they reacted to this pressure by canceling the class, there were no facts known to [the administrators] indicating a “clear and present danger” of any evil, let alone a “serious substantive one.” Nor was there any suggestion that the production of the play would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school...” [citation omitted] Rather, school officials were merely concerned with “avoid[ing] the discomfort and unpleasantness that always accompany” an unpopular or unorthodox point of view . . . [citation omitted].

Unsupported speculation about the potentially “disruptive” nature of Professor Mayer’s assigned readings would be dangerous. See *Burnham v. Ianni* 119 F.3d 668 (8th Cir. 1997). In that case, the Eighth Circuit (sitting en banc) held that the chancellor of the University of Minnesota at Duluth violated the First Amendment when he removed photographs of two professors posing with weapons from a campus exhibit. The court wrote that:

We recognize that the government, as an employer, has broader powers in suppressing free speech than the government as a sovereign. Indeed, we have given some deference to an employer’s predictions of workplace disruption. . . . However, we have never granted any deference to a government supervisor’s bald assertions of harm based on conclusory hearsay and rank speculation . . . . There is simply no evidence that establishes a nexus between the two photographs and an exacerbated climate of fear on the campus or, more importantly, that establishes a relationship between the photographs and a decrease in the efficiency and effectiveness of UMD’s educational mission.

*DiBona* and *Burnham* are important precedents—likely to be applied when campus officials seek to silence “provocative” classroom expression, usually in response to pressures from internal or external constituencies. Nonetheless, both cases have to be balanced against other opinions that give considerable deference to school and college

officials. See *Boring v. Buncombe County Board of Education* (4<sup>th</sup> Circuit, February 13, 1998, *SWR* 98.9, p. 707: Editing of a play by school officials “does not present a matter of public concern and is nothing more than an ordinary employment dispute”); *Jeffries v. Harleston* (2<sup>nd</sup> Circuit, April 18, 1995, *SWR* 95.20, p. 349: The City College of New York did not violate the rights of a department chair, demoted for making inflammatory remarks about Jews in an off-campus speech); *Edwards v. California University of Pennsylvania* (3<sup>rd</sup> Circuit, August 10, 1998, *SWR* 98.35, p. 761: Public university professor does not have a First Amendment right to decide what will be taught in the classroom; *Urofsky v. Gilmore* 4<sup>th</sup> Circuit, No. 98-1481, June 23, 2000, *SWR* 00.24, p. 996: Universities—not professors—have academic freedom).

The fact that a wide variety of seemingly contradictory cases can be found on these issues suggests that administrators need to act with caution. The realities of campus politics—and the risk of personal liability—require careful attention to the standards set forth in *Dibona* and *Burnham*, even if some courts would define campus First Amendment freedoms more narrowly.

### **Student academic freedom/ responsibility for grading**

- [c] Professor Mayer should be advised that if she believes a student has disrupted her class she should initiate disciplinary action, in accordance with established procedures. What she must not do, however, is use her grading authority as a means of ideological coercion. Whether protected by the First Amendment at public institutions, or as a matter of good policy at private institutions, students as well as faculty members have academic freedom in the classroom. *Tinker v. Des Moines* 393 U.S. 503 (1969) (wearing armbands in class—as a form of silent protest—is protected by the First Amendment).

While Professor Mayer probably could not be compelled by the college to give a particular grade to the student (see *Parate v. Isibor* 868 F.2d 821, 6<sup>th</sup> Cir. 1989), any grade she does award must reflect an honest, professional assessment of the student’s work. Although rare, it’s possible that a professor’s grade can be challenged on the ground that it was “arbitrary and capricious,” or reflected “bad faith.” *Connelly v. University of Vermont* 244 F.Supp. 156 (D. Vt. 1965).

In any event, final authority over grading policies rests with the university, not Professor Mayer. See *Lovelace v. Southeastern Massachusetts University* 793 F.2d 419, 425-426 (1<sup>st</sup> Cir. 1986) (matters such as “course content, homework load, and grading policy are core university concerns” subject to “policy decisions” by university administrators), and *Parate*, supra. If necessary, the university should make other arrangements to evaluate the student’s work, so a proper grade can be given.

### **Provocative expression off-campus**

- [d] Professor Mayer’s speech about sexual assaults on college campuses seems calculated to foster needlessly provocative stereotypes. Nonetheless, her comments address what can be seen as a matter of “public concern,” and should not be a motivating factor in subjecting her to discipline.

Discipline might be justified, however, if Placid State tenure policies so permit, and if the University can “make a substantial showing” that any disciplinary action was based upon “a reasonable prediction” that Professor Mayer’s speech “would disrupt university operations” (*Jeffries v. Harleston*, *supra*). This standard—which many professors will see as a dangerous intrusion upon academic freedom—was drawn from the U.S. Supreme Court’s 1994 decision in *Waters v. Churchill* (SWR 94.85, p. 300: plurality opinion, holding that an administrator at a government agency could take disciplinary action against an employee for what the employee “supposedly” said, even on a matter of public concern, if the administrator made factual determinations in a reasonable manner, and reasonably predicted the employee’s expression would be disruptive). *Waters* was subsequently applied by the Supreme Court to the *Jeffries* case, *supra*, but commentators remain divided over whether the holding is limited to discipline of academic *administrators* (*Jeffries* was a department chair).

### **Demearing and defamatory expression on campus**

- [e] Professor Mayer, like most faculty members, evaluates students on the quality of their expression. She also needs to understand that *her* expression is subject to review by her employer, and can result in adverse action, especially when the expression is defamatory, or otherwise poisons the work environment.

Publicly accusing a colleague of plagiarism is an especially serious matter. Such an accusation, if false, could result in civil liability. It may also justify disciplinary action by an employer, including a college or university. See *Feldman v. Bahn* 12 F. 3d 730 (7<sup>th</sup> Cir., 1993): “[A]n unsupported charge of plagiarism reflects poorly on the accuser; the First Amendment does not ensure that a faculty member whose assessment of a colleague’s work reveals bad judgment will escape the consequences of that revelation . . .”

### **Sarcasm and profanity directed toward students**

- [f] The full range of provocative expression that would be permitted at a political rally, or an artistic performance, may not be used without restraint in the classroom. Political activists can be good (indeed, sometimes great) classroom teachers, but they must have the capacity to distinguish between teaching and proselytizing.

Teachers must also remember that they work for employers; those employers can expect them to serve as role models for civil discourse, especially when students in their classes comprise something akin to a “captive audience.” See *Martin v. Parrish* 805 F.2d 583 (5<sup>th</sup> Cir. 1986): “Repeated failure by a member of the educational staff of Midland College to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach.” See also *Clark v. Holmes* 474 F. 2d 928, 931 (7<sup>th</sup> Cir. 1972): “But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution”.

The fact that professor Mayer has tenure does not excuse her from failing to meet accepted standards of professional competency, or engaging in acts that might reflect moral turpitude. See *Clarke v. Board of Education of the School District of Omaha* 338 N.W.2d 272 (Neb. 1983): Use of racial epithets in the classroom constitutes "immorality" and justifies termination of tenured teacher.

### **Student evaluations**

[g] Academic administrators can expect minimal standards of faculty performance, assessed—in part—by student evaluations. Professor Mayer may be free to criticize the evaluation requirement, or seek to modify it. However, her unilateral action in refusing to allow students with grades below C to participate in the evaluation process is not protected by academic freedom. See *Wirsing v. Board of Regents of the University of Colorado* 739 F. Supp. 551 (D. Colo. 1990):

“Under the Regents’ policy, Dr. Wirsing is required to set aside class time for the administration of the [evaluation forms] . . . However, Dr. Wirsing is not required to distribute the forms herself . . . Hence she is not communicating an idea to her students . . . Although the form is contrary to what Dr. Wirsing teaches, her free speech is not implicated.

### **[32] Student “freedom to learn.”**

Beyond freedom of expression, there appears to be a second component of student academic freedom--what might be called a *freedom to learn*. The concept is drawn from the classic 1915 AAUP “Declaration of Principles,” which contains the opening statement that “‘academic freedom’ has traditionally had two applications--to the freedom of the teacher and to that of the student, *Lehrfreiheit* [to teach] and *Lernfreiheit* [to learn].”

What does the “freedom to learn” mean? Even in the freedom of expression cases, there’s a suggestion that something more is involved than an abstract right to disagree. Schools and colleges are uniquely equipped to shape minds and mold values. In a free society, they must do so in a way that provides at least some breathing room for independent thought and conscience. In *Tinker* (supra), Justice Fortas wrote:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . In *Meyer v. Nebraska* . . . Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

How can educators protect at least some degree of individual autonomy in their students? One answer might be to see the definition of truth as an end in itself--an ongoing enterprise undertaken with students in a "marketplace of ideas." Justice Brennan articulated this view in *Keyishian* (supra):

'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker* . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth `out of a multitude of tongues, [rather] than through any kind of authoritative selection.'

This is a pedagogical perspective blended with a legal conclusion. The Court is suggesting that the best learning occurs in a setting where ideas (presumably even the teacher's ideas) are questioned and tested. In this context the student is a *participant* in a shared inquiry, not a passive recipient of ideology. Justice Warren's observation in *Sweezy* (supra) conveys a similar message, which was also stated by Justice Frankfurter, concurring in the same case. Frankfurter cited with approval a statement of a conference of senior scholars "on behalf of continuing the free spirit of the open universities of South Africa:"

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates -- `to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university.

The idea that "[d]ogma and hypothesis are incompatible" suggests that the "freedom to learn" encompasses freedom from indoctrination. The problem, of course, is deciding how "indoctrination" should be defined.

### **Distinguishing indoctrination from teaching**

Most educators want to avoid "indoctrination," but drawing lines is difficult. Is it "indoctrination" for a teacher to express an impassioned point of view in the classroom? Do colleges "indoctrinate" students when they require study of a foreign language, or the literature of other cultures? To those questions, standing alone, we think the answer is *no*. Some of the best teachers we've

had have been extravagantly opinionated. And some of the best courses we've taken have been required. Yet in neither context did we feel "indoctrinated." Why not?

At heart, students can sense a difference between teaching that serves as a catalyst to growth, and teaching that serves to stifle it. The latter usually comes prepackaged in humorless certitude, grounded in the view that the teacher or the college has an absolute hold on truth. Often in this context the student is perceived as the proverbial infidel, having been diverted from the one true faith by ignorant parents or a degenerate culture. A soul has to be saved—not an intellect formed.

Ultimate aims will define tone and substance. The opinionated teacher who seeks to foster growth *provokes* us with ideas and opinions. She seeks to disorient us and make us think anew. One senses she would be disappointed if we readily agreed with her. She doesn't seek to convert us to her views as much as encourage us to form our own.

Likewise, a college that seeks to promote student growth may have required courses, but those courses are usually part of a curriculum designed to broaden minds, not channel them. The implicit or explicit assumption is that exposure to differing ideas and methodologies will enable students to navigate (and perhaps synthesize) multiple worlds. Required courses in which teachers reflect this aim can be among the most stimulating any student can take. There is no sense of "indoctrination."

We referred earlier to "saving souls" and "conversion." Religious metaphors seem apt, not because religious perspectives always lead to indoctrination, but because insights into religion and the religious experience can help us understand good teaching.

Our religion is our fundamental belief system. It can take the form of theism, politics, work, or even consumption. From time immemorial many "true believers" have tried to convert others by compulsion. But in virtually every prominent religious and intellectual tradition other devotees have looked deeply into the sources of their faith and discovered. . . *humility*. These are the great teachers (Buddha and Socrates come to mind). They recognized that the path to wisdom was a partnership between teacher and student. In this partnership, truth (or a closer approximation of truth) was not transmitted from one to the other, but shaped and defined by both.

Humility does not have to be meek. It can be joyful, playful, even assertive, as long as it remains self-critical. An assertive humility is protective of ideas and institutions that allow truth to be discovered in multiple ways from multiple perspectives. Thoughtful defenders of the First Amendment and the related doctrine of academic freedom exhibit this trait.

### **The synergy between humility, good teaching, and academic freedom**

What is the possible synergy between humility, good teaching, and academic freedom? All three are supportive of the view that other people are worthy of respect as participants in a community of shared inquiry. This is a not a community where everyone can do whatever they like, or even assert—without penalty--whatever they wish (e.g., a student in a mathematics class who contends  $2+2=5$  may deserve a failing grade). But it is a setting where everyone has some limited opportunity to contribute to whatever working hypothesis the community defines as truth (e.g., a student in a mathematics class who wishes to argue that  $2+2=5$  should at least be

heard). At heart, this is a right to be a *thinker* and a *doer*—not a “thing,” or a passive receptacle of someone else’s knowledge. It is a core component of what we mean by a “freedom to learn,” whether defined by a court or adopted by educators as a matter of good practice.